87-2042

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WARNER CABLE COMMUNICATIONS INC.,
Petitioner

v.

CITY OF NICEVILLE, FLORIDA, and THE STATE OF FLORIDA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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June 14, 1988

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QUESTION PRESENTED

Whether a defendant in a civil action has been denied due process of law guaranteed under the fourteenth amendment to the United States Constitution when a Florida trial court struck the defendant's affirmative defenses as issues collateral to the civil action, did not allow the defendant to be heard on those defenses at trial, then after trial entered a final judgment against defendant on the merits of the defenses which had been struck, and subsequently foreclosed those collateral claims from being heard in another civil action by declaring the previously rendered judgment against the defendant on the excluded issues to be res judicata.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below and before this Court are the petitioner Warner Cable Communications Inc. and the respondents City of Niceville, Florida, and the State of Florida.

The parent company of the petitioner Warner Cable Communications Inc. is Warner Communications Inc. Warner Cable Communications Inc.'s affiliates and subsidiaries are Houston Cable TV Inc.; Palm Springs Communications Corporation; Warner Cable Communications of Cincinnati, Inc.; Warner Cable Communications of Harris County, Inc.; Warner Cable Communications of Lynn, Inc.; Warner Cable Communications Operating Corp.; Warner Cable Communications Operating Ltd.; Warner Cable Communications of Reston, Inc.; Western Arizona CATV; Warner Cable of New York, Inc.; Queens Inner Unity Cable System; Gulf Coast Cable Television; Warner Cable Communications Company of Brooklyn; Warner Cable Communications Company of Greater Akron; Warner Cable Communications Company of Greater Cincinnati; Warner Cable Communications Company of Queens.

Warner Communications Inc.'s significant affiliates and subsidiaries are Warner Bros., Inc.; Globe Export Corporation Produzione Inter Continentale Cinematografica S.p.A.; Productions et Editions Cinematographiques Francaises S.A.R.L. (P.E.C.F.); Warner Bros. Distributing Corporation; Warner Bros. (Transatlantic), Inc.; Warner Bros. (Sweden) A.B.; Warner Bros. (Finald) O.Y.; Warner Bros. (D) A/S; Warner Bros. (Continental, Inc.; Warner Bros. (F.E.), Inc.; Warner Bros. Television Distribution, Inc.; Warner Bros. Publications Inc.; Warner Bros. Music International Inc.; Warner Home Video Inc.; Warner-Tamerlane Publishing Corp.; WB Music Corp.; W Cinemas Holding Inc.; W. Cinemas Inc.; Alpha Theatres Inc.; WCI/GFI Inc.; Warner Bros. Records Inc.; Atlantic Recording Corporation; Super

Hype Publishing, Inc; East West Records, Inc.; Cotillion Music, Inc.; Walden Music, Inc.; Warner-Elektra-Atlantic Corporation; WEA International Inc.; Warner Bros. Records (Japan) Inc.; Warner-Pioneer Corporation; WEA Realty Inc.; Warner Special Products Inc.; WEA Manufacturing Inc.; Allied Record Company; Warner/Chappell Music, Inc.; Cafe Americana Inc.; Intersong U.S.A. Inc.; Jadar Music Corporation; New Chappell Inc.; Rick's Music Inc.; Rightsong Music Inc.; Tri-Chappell Music Inc.; Unichappell Music Inc.; Warner Cable Operating Inc.; Warner Publishing, Inc.; DC Comics Inc.; E.C. Publications, Inc.; Publisher's Advertising Associates, Inc.; Warner Books, Inc.; Warner Publisher Services Inc.; Warner Communications (UK) Holdings; Warner Home Video (U.K.) Limited; WEA International Services Limited; Warner Bros. Distributors Limited; Warner Bros. Theatres Ltd.; WCI Finance Limited; Warner Bros. Music Limited; WEA Records Limited; Warner Bros. Productions Limited; Warner Bros. Television Ltd.; Atari Holdings, Inc.; AIL Holdings Limited; AIL Ireland Limited, Warner Communications Investors, Inc.; WCI Commercial Corp.; WCI Entertainment Pioneering Inc.; WCI-FMC Venture Corp.; WCI Theatre Inc.; WNM Ventures Inc.

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IN THE

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OCTOBER TERM, 1987

No. ——

WARNER CABLE COMMUNICATIONS INC.,
Petitioner

v.

CITY OF NICEVILLE, FLORIDA, and THE STATE OF FLORIDA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The petitioner Warner Cable Communications Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in the above-entitled proceeding on January 14, 1988, and that court's denial of petitioner's motion for rehearing on March 16, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 520 So.2d 245 and is reprinted in the appendix hereto, p. 1a, *infra*.

The final judgment and other orders striking affirmative defenses and dismissing the action on collateral issues rendered by the Circuit Court of the First Judicial Circuit in and for Okaloosa County, Florida (Fleet, J.) have not been reported. The final judgment is reprinted in the appendix hereto, p. 4a, *infra*, and the other ap-

plicable orders are also reprinted in the appendix hereto, pp. 13a, 17a, 47a, *infra*.

JURISDICTION

On petitioner's appeal, the decision of the Supreme Court of Florida was issued on January 14, 1988, See pp. 1a-3a, *infra*. A timely motior for rehearing and for clarification was denied on March 16, 1988, by the Supreme Court of Florida. See p. 22a, *infra*. On March 16, 1988, the mandate of the Supreme Court of Florida on its original decision was entered. See p. 21a, *infra*.

This application for writ of certiorari is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION

Fourteenth Amendment, United States Constitution:

> * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

STATEMENT OF THE CASE

The respondent City of Niceville filed a complaint for validation of revenue bonds on August 26, 1986. The purpose of the revenue bonds sought to be validated was to fund an amount not to exceed $2,000,000 for the acquisition, ownership, construction, and operation of a municipally owned cable television system. The respondent State of Florida answered the complaint, and the petitioner became a party in the bond validation proceeding pursuant to Section 75.07, Florida Statutes, by answering the complaint and filing affirmative defenses on October 6, 1986. See p. 42a, *infra*. (Reference hereafter to "respondent" shall mean the respondent City of Niceville only.)

In paragraph 9 of its answer, the petitioner raised the affirmative defense that the local ordinance which authorized respondent's issuance of the revenue bonds was invalid because the respondent had failed to comply with the requirements of the city charter for enacting an ordinance authorizing expenditures exceeding $100,000. The petitioner raised another affirmative defense in paragraph 10 of its answer that the respondent could not be permitted to issue the revenue bonds for a municipally owned cable television system under the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-559 ("the Cable Act"), because the respondent had not met the requirements for such ownership under the Cable Act, and even if the respondent complied, such compliance would be a violation of the Florida Constitution's prohibition against unlawful delegation of authority. The petitioner asserted in paragraph 11 of the answer as an affirmative defense that the revenue bonds could not be issued because the bond issue had not been approved by referendum vote and would require the respondent to pledge ad valorem taxes to secure the bonds. Paragraph 12 of the answer raised the affirmative defense that the respondent abused its discretionary authority and acted arbitrarily and in bad faith in enacting and implementing the local bond issue ordinance. This affirmative defense also attacked the necessity and economic and fiscal feasibility of the respondent's cable television system project. See pp. 43a-45a, *infra*.

On the respondent's motion, the trial court struck the petitioner's defenses as matters collateral to a bond validation proceeding. See pp. 14a-15a, *infra*. The petitioner subsequently asked the trial court to reconsider its ruling striking the affirmative defenses in paragraphs 10 and 11 of the answer. In an order entered on March 16, 1987, the trial court affirmed its striking of those two affirmative defenses, reiterating its conclusion that those defenses were matters collateral to a bond validation proceeding. Additionally, the trial court declared that it

would neither consider nor address in the bond validation proceedings any matters or issues raised by those affirmative defenses. See pp. 17a, 18a, *infra*.

As a result of the trial court's rulings, the petitioner, with other taxpayers, filed on March 20, 1987, a civil action in the same trial court raising, among other claims, the claims against the respondent which the trial court had struck as collateral to the bond validation proceedings.

The bond validation proceeding was tried on July 21, 1987. During the trial, the respondent introduced evidence that its proposed project would not require pledging of ad valorem taxes, a matter raised and challenged by one of the petitioner's affirmative defenses which had been struck by the trial court. When the petitioner attempted to cross examine the respondent's witnesses on this issue and tried to present evidence contrary to the respondent's position, the trial court did not permit this line of questioning and would not allow the introduction of the petitioner's evidence. The trial court also precluded the petitioner from introducing evidence concerning the respondent's budgeting and expenditure of funds for the municipally owned cable television system.

The trial court issued a final judgment on August 5, 1987, finding the bond issue to be for a public purpose and to have been enacted in accordance with law. However, the trial court also inexplicably ruled against the petitioner on the merits of the issues raised by the petitioner's affirmative defenses, the same affirmative defenses which had been struck and which were expressly precluded from being heard at trial. See pp. 4a-12a, *infra*.

The petitioner timely appealed to the Supreme Court of Florida the final judgment validating the revenue bonds. In its appeal, the petitioner challenged the trial court's determination of a valid, public purpose and its conclusion

that the respondent had met all legal and procedural requirements for validating the bonds. The petitioner also appealed the trial court's striking of the affirmative defenses as being matters collateral to bond validation review. Because the trial court had struck the affirmative defenses and then ruled on the merits of those defenses in its final judgment without hearing those defenses, the judgment on the merits of those defenses was also challenged as a denial of fundamental due process. See pp. 33a-40a, *infra*.

On January 14, 1988, the Supreme Court of Florida affirmed the trial court's judgment in all respects, concluding that the respondent's cable television system project serves a public purpose, that the respondent had met all legal requirements for a bond issue, and that the stricken affirmative defenses raised collateral issues which would be addressed in other courts in other cases. See pp. 1a-2a, *infra*. In the words of the Supreme Court of Florida (p. 2a, *infra*):

> We also agree with Niceville and the circuit court that Warner's affirmative defenses are collateral issues, and therefore, not cognizable in this bond validation. * * *
>
> Niceville points out that Warner has filed several lawsuits against the city raising these same issues. While they may be addressed by other courts in other cases, they are not properly raised in a bond validation.

The decision of the Supreme Court of Florida did not address the petitioner's claim of denial of due process under the fourteenth amendment of the United States Constitution, and therefore, the petitioner timely filed a motion for rehearing on that issue. See pp. 23a-32a, *infra*. The petitioner noted that the Supreme Court of Florida had failed to address the constitutional claim of denial of due process and that with the trial court's judgment affirmed in all respects and without the findings on

the merits of the stricken affirmative defenses being vacated, the judgment would be deemed res judicata on the collateral issues and would preclude the petitioner from having these claims heard in state and federal actions previously commenced. See pp. 27a-32a, *infra*. The Supreme Court of Florida was informed of respondent's raising the defense of res judicata in one of the pending court proceedings.

On March 16, 1988, the motion for rehearing was denied, and the Supreme Court of Florida issued its mandate. See pp. 21a, 22a, *infra*. In the aftermath of this affirmance, the respondent moved the same trial court to dismiss the claims on the collateral issues in the subsequent state civil action on the ground that the judgment in the bond validation was res judicata as to the collateral issues. The trial court agreed and dismissed those claims as having been determined by the bond validation judgment. See pp. 47a-52a, *infra*.

REASON FOR GRANTING THE WRIT

The decision of the Supreme Court of Florida conflicts with the decisions of this Court and seriously affects the fairness, integrity and public reputation of judicial proceedings.

When the Supreme Court of Florida affirmed the trial court's judgment without vacating those portions of the judgment which ruled against the petitioner on the merits of the affirmative defenses which were struck and not heard, the court acted contrary to the decisions of this Court and the due process guarantees of the fourteenth amendment of the United States Constitution. More than a mere possibility of a due process violation is apparent on the facts of this case, and therefore this Court is empowered to consider the due process question raised. *Wood v. Georgia*, 450 U.S. 261, 264-65 (1981). Errors which "seriously affect the fairness, integrity or public

reputation of judicial proceedings" are given plenary consideration by this Court. *United States v. Atkins*, 297 U.S. 157, 160 (1936); *see New York Central Railroad Co. v. Johnson*, 279 U.S. 310, 318-19 (1929); *Brasfield v. United States*, 272 U.S. 448, 450 (1926).

The failure of the Supreme Court of Florida to overturn the judgment on the merits of the stricken affirmative defenses directly conflicts with this Court's ruling in *Saunders v. Shaw*, 244 U.S. 317 (1917). This Court ruled in *Saunders* that it was a violation of due process of law for a state supreme court to reverse a lower court decision and to render a judgment against an intervening defendant based on facts which were ruled inadmissible and immaterial and concerning which the defendant had no opportunity to introduce evidence and to be heard. The trial court in *Saunders* had ruled that evidence sought to be introduced by the plaintiff to be immaterial and outside the issues raised by the pleadings. 244 U.S. at 318. The plaintiff made a proffer of the evidence, but defendant presented no evidence on the issue ruled as immaterial. *Id.* at 318-19. When the state supreme court reversed the trial court's decision in favor of the defendant, it relied on the proffered evidence. *Id.* at 319. The Court reversed the state supreme court's judgment against defendant because the case had been "decided against him without his ever having had the proper opportunity to present his evidence." *Id.*

The conflict between *Saunders* and the instant case could not be more complete. While the defendant in *Saunders* was precluded by his own objection to materiality from presenting evidence and being heard on the issue and in contrast the petitioner in this case was prevented from being heard by the respondent's objections and motion to strike, these differences are not significant to the issue of petitioner's being deprived of due process by having the collateral issues decided against it without an opportunity to be heard.

Indeed, the circumstances of the instant case are even more egregious than the due process violation in *Saunders*. The petitioner was expressly prohibited from presenting any evidence on the collateral issues and was instructed by the trial court that those issues would be neither considered nor addressed. After giving this admonition and striking the defenses, the trial court permitted respondent, but not petitioner, to introduce evidence on the issues so struck and then ruled against petitioner on those issues. Finally, totally foreclosing the petitioner's opportunity to be heard on the collateral issues, the trial court dismissed the subsequent civil action, which had properly raised those claims, by declaring that the bond validation judgment was res judicata and had decided the issues.

The effect of the complete affirmance by the Supreme Court of Florida of the bond validation judgment is to deprive the petitioner of ever presenting its case on the stricken defenses and collateral claims and having the merits of those claims fairly adjudicated—a right clearly protected by the due process clause of the fourteenth amendment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Petitioner's causes of action are property protected by the fourteenth amendment. 455 U.S. at 428. The affirmance of all aspects of the bond validation judgment has subjected the findings on the unheard collateral issues to the doctrine of res judicata which is " 'the equivalent of denying [petitioner] an opportunity to be heard upon [its] claimed right[s].' " *Id.* at 429; *see Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). This result is contrary to the due process guaranty which extends to litigants in judicial proceedings. *Saunders*, 244 U.S. at 320; *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930).

The combined actions of the Supreme Court of Florida and the trial court are so grossly violative of fundamental due process and the principles of *Saunders* that

the basic fairness and integrity of the judicial proceedings are called into question. The exceptional circumstances of this case have not only been flagrantly unfair to petitioner but have also denigrated the basic underpinnings of justice and fairness of the judicial process. The condonation by the Supreme Court of Florida of the trial court's striking petitioner's claims and subsequent ruling against the petitioner on the merits of those claims is directly at odds with this Court's ruling in *Saunders* and with the concept of fundamental fairness and justice. Plenary consideration of the matter by this Court is essential.

CONCLUSION

For the reasons set forth above, petitioner prays that the Court grant this petition and review the judgment and opinion below.

Respectfully submitted,

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June 14, 1988

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APPENDIX A

SUPREME COURT OF FLORIDA

No. 71,134

WARNER CABLE COMMUNICATIONS, INC., *et al.*,
Appellants,

v.

CITY OF NICEVILLE, FLORIDA,
Appellee.

[January 14, 1988]

PER CURIAM.

Warner Cable Communications appeals the circuit court's validation of a proposed bond issue by the City of Niceville. We have jurisdiction. Art. V § 3(b)(2), Fla. Const. We affirm the trial court's order.

Niceville filed a complaint for validation of $2,000,000 in revenue bonds with which it proposes to establish a municipally owned cable television system. Both the state and Warner answered the complaint. Warner, which currently provides cable service in Niceville, raised several affirmative defenses, including, among other things, the economic and fiscal feasibility of a municipally owned cable project, the necessity for such a project, and the applicability of federal cable law. On the city's motion the court struck the defenses as being collateral to a bond validation proceeding. The court later validated the bond issue, and this appeal ensued.

Warner now claims that the court erred in finding the bond issue to be for a public purpose and to have been enacted in accordance with law. The cable company also complains that the court erred in its rulings on Warner's defenses. Niceville, on the other hand, supports the court's validation of the bond issue.

Judicial inquiry in bond validation proceedings is sharply limited. It extends only to determining if a public body has the authority to issue the subject bonds and if the purpose of the bonds is legal and to ensuring that the bond issue complies with all legal requirements. *Lodwick v. School District of Palm Beach County*, 506 So.2d 407 (Fla. 1987); *Taylor v. Lee County*, 498 So.2d 424 (Fla. 1986). Other matters are collateral to a bond issuance and will not be addressed in a validation proceeding. *Zedeck v. Indian Trace Community Development District*, 428 So.2d 647 (Fla. 1983).

The circuit court found that the city had authority to issue these bonds, that they were for a valid public purpose, and that the city had complied with the requirements of law. Warner has demonstrated no error in the court's findings. We also agree with Niceville and the circuit court that Warner's affirmative defenses are collateral issues and, therefore, not cognizable in this bond validation.* We affirm the trial court's order.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

---

* Niceville points out that Warner has filed several lawsuits against the city raising these same issues. While they may be addressed by other courts in other cases, they are not properly raised in a bond validation.

An Appeal from the Circuit Court in and for Okaloosa County—Bond Validations

Erwin Fleet, Judge—Case No. 86-2427-C

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for Appellants

Don J. Caton and William D. Wells, Pensacola, Florida; and Gillis E. Powell, Sr. of Powerll, Powell & Powell, P.A., Niceville, Florida,

for Appellee

APPENDIX B

IN THE CIRCUIT COURT
IN AND FOR OKALOOSA COUNTY, FLORIDA

Re: Validation of not
Exceeding $2,000,000
Cable Television
Revenue Bonds,
Series 1985
Case No. 86-2427-C

CITY OF NICEVILLE, FLORIDA, a municipal corporation of the State of Florida,

Plaintiff,

—vs—

STATE OF FLORIDA and the TAXPAYERS, PROPERTY OWNERS AND CITIZENS OF NICEVILLE, FLORIDA, including non-residents owning property or subject to taxation therein, *et al.*,

Defendants.

FINAL JUDGMENT

The above and foregoing cause came on for final hearing on the date (Tuesday, July 21, 1987) and at the same time and place set forth in the Order to Show Cause heretofore issued by this Court and in the notice addressed to the State of Florida and the several property owners, taxpayers and citizens of the City of Niceville, Florida (hereinafter called "Plaintiff"), including non-residents owning property or subject to taxation therein and all others having or claiming any right, title or interest in property to be affected by the issuance by Plaintiff, of not exceeding $2,000,000 Cable Television

Revenue Bonds, Series 1985 (hereinafter called "Bonds"), more particularly described, or to be affected in any way thereby, as heretofore issued against the State of Florida on complaint of Plaintiff, and Curtis A. Golden, State Attorney, and Warner Cable Communications, Inc. each having filed an answer herein, this cause having duly come on for final hearing, and the Court having considered the same, heard the evidence and being fully advised in the premises, finds as follows that:

1. Plaintiff is and at all times hereinafter mentioned was, a duly and legally organized and existing municipal corporation of the State of Florida, created and incorporated under the provisions of the Constitution and laws of the State of Florida, particularly Chapter 31034, Laws of Florida, Special Acts of 1955, as amended by Ordinance No. 511, duly enacted by Plaintiff pursuant to Chapter 166, Part I, Florida Statutes, said ordinance being approved by referendum vote.

2. Plaintiff, in and by Chapter 166, Parts I and II, Florida Statutes, is authorized to acquire and construct a cable television system to be owned and operated by Plaintiff (the "System") of Plaintiff (hereinafter called the "Project"), to pledge the Pledged Revenue to the payment of such Bonds and the interest thereon, all as more particularly described in the Complaint heretofore filed herein.

3. It is necessary for the continued preservation of the health, welfare, convenience and safety of Plaintiff and its inhabitants to acquire and construct the Project, and it is essential that same be accomplished in accordance with the provisions of Ordinance No. 583, duly enacted by Plaintiff on October 16, 1985 (hereinafter called "Ordinance"), which Ordinance authorizes the issuance of the Bonds hereinafter more particularly described.

4. Ordinance No. 583 (Plaintiff's Exhibit 5) was duly adopted by the City Council on three separate readings

and all procedural requirements with regard to the adoption of said ordinance pursuant to the 1955 City Charter (Plaintiff's Exhibit 3) and the new City Charter (Ordinance No. 511—Plaintiff's Exhibit 4) have been complied with. Since the procedural requirements of both the original and new City Charters with regard to adoption of ordinances were complied with, the Court does not find it necessary to decide which City Charter was in effect at the time of adoption of Ordinance No. 583.

5. The facts and evidence adduced at final hearing establish that the cable television system to be financed through the revenue bonds at issue will provide entertainment, news and other sources of information to the citizens of Niceville, and further that the system is intended to provide vital health and safety services as well. The legislative finding of municipal purpose by the plaintiff is neither arbitrary, capricious, nor contrary to law. Accordingly, the Court concludes that the project to be financed constitutes a valid public purpose under Florida law.

6. Plaintiff has not expended monies in excess of $100,000 for the cable television project in any single fiscal year or any combination of fiscal years since the inception of the project. Therefore, Section 1.02(h) of Ordinance No. 511 of the City is not applicable.

7. Neither the actions taken by the City Council nor the provisions of Section 613 of Title IV United States Code (Cable Communications Policy Act of 1984) preclude the City of Niceville from issuing the bonds contemplated herein.

8. Neither the state nor the intervenor has shown or proffered evidence to show that the bonds in question constitute a pledge of public credit or that the legislative determination of public purpose made by the plaintiff was so clearly wrong as to be beyond the power of the plaintiff.

9. Evidence entered and proffered by the intervenor primarily concerns the subjects of political, financial, or economic feasibility; need and necessity of the project; and business policy and judgment. As such, these matters are beyond the scope of judicial interference in this proceeding. Such questions are properly the responsibility of the governing body of the City of Niceville and there has been no evidence either entered or proffered that leads this Court to conclude that there was any showing of fraud or violation of legal duty by the plaintiff. *DeSha v. City of Waldo*, 444 So.2d 16 (Fla. 1984); *Penn v. Pensacola-Escambia Governmental Center Authority*, 311 So.2d 97 (Fla. 1975); *Linscott v. Orange County Industrial Development Authority*, 443 So.2d 97 (Fla. 1983); *Nohrr v. Brevard County Educational Facilities Authority*, 247 So.2d 304 (Fla. 1971); *Town of Medley v. State*, 162 So.2d 257 (Fla. 1964); and *State v. City of Daytona Beach*, 431 So.2d 981 (Fla. 1983). The Court finds that there is no evidence upon which to conclude that the legislative action taken by the City Council of the City of Niceville was arbitrary, capricious, or contrary to law.

10. It is proper and legal for a municipality to engage in private business even though it may compete with other privately owned businesses providing similar services. *City of Winter Park v. Montesi*, 448 So.2d 1242 (5th DCA 1984); *City Gate Garage v. City of Jacksonville*, 66 So.2d 653 (Fla. 1953); *Starlight Corporation v. City of Miami Beach*, 57 So.2d 6 (Fla. 1952); *Sunny Isle Fishing Pier v. Dade County*, 79 So.2d 667 (Fla. 1955); and *State v. City of Jacksonville*, 50 So.2d 532 (Fla. 1951).

11. Questions of financial strength of the project and matters of business judgment and policy are not within the scope of the Court's review when they do not relate to the issues going directly to the power of the plaintiff to issue the bonds and the validity of the proceedings with relation thereto. It is the duty of the City Council of the City of Niceville and not the Court to determine what is

good or bad for the City. *DeSha v. Waldo, supra,* and *State v. City of Daytona Beach,* supra.

12. The issue of public purpose encompasses both governmental and proprietary activities of a municipality. *City of Winter Park v. Montesi,* supra.

13. Other arguments set forth in intervenor's brief are more properly addressed to the legislative body of the City of Niceville and not this Court. It is not necessary for the Florida legislature to make a legislative finding of public purpose or to declare cable television to be a public utility. The legislative action taken by the Niceville City Council in furtherance of this project is completely authorized by its home rule authority contained in Art. VIII, Sec. 2b of the Florida Constitution, Ch. 166 of the Florida Statutes, and case law set forth herein.

14. Pursuant to and in accordance with the provisions of the Constitution and the laws of the State of Florida, Plaintiff, by the Ordinance, authorized and provided for the issuance of the Bonds to be dated as of a date to be determined by resolution of Plaintiff prior to the delivery of the bonds, to be in such denominations; to bear interest, payable on such dates and in such years and amounts and at a rate or rates not exceeding the maximum rate fixed by the Act or by other applicable law, and to mature on such dates and in such years and amounts as are fixed by resolution of Plaintiff adopted prior to the delivery thereof, all of which appears and is more fully set forth in the certified copy of the Ordinance herefore filed herein.

15. The Bonds shall be payable solely from and secured by a lien upon and pledge of the net revenues derived by Plaintiff from the operation of the System, the guaranteed entitlement portion of the revenue sharing trust funds of the State of Florida as defined in and distributable to Plaintiff pursuant to Chapter 218, Florida Statutes (the "Revenue Sharing Trust Funds"), and the proceeds

of the local government half-cent sales tax, as defined and described in, and distributed to Plaintiff under, Part VI, Chapter 218, Florida Statutes (the "Sales Tax Revenues") (the Revenue Sharing Trust Funds and Sales Tax Revenues collectively referred to as the "Excise Taxes") (the net revenues and Excise Taxes hereinafter collectively referred to as the "Pledged Revenues"), all in the manner provided in the Ordinance. The pledge of the Excise Taxes is subject to being released and extinguished upon the happening of certain events as provided in the Ordinance. Such Ordinance further provides that no ad valorem taxes shall be required to be levied for the payment of the principal of or interest on such Bonds, but that such principal and interest shall be payable only from the Pledged Revenues mentioned above. The Bonds will not constitute a general indebtedness of Plaintiff within the meaning of any constitutional or statutory provision or limitation. The Bonds shall not constitute a lien upon the System or upon any other property of or in the Plaintiff, but shall constitute a lien only upon the Pledged Revenues.

16. Plaintiff has found and determined in the Ordinance that the estimated Pledged Revenues will be sufficient to pay all of the principal of and interest on the Bonds and to make all other payments provided for in the Ordinance.

17. The Bonds are not "bonds" within the meaning of Article VII, Section 12 of the Florida Constitution of 1968, and are not required by the Constitution and Statutes to be approved at an election.

18. Plaintiff, pursuant to the Constitution and laws of the State of Florida, has the power, is authorized, and in the Ordinance has covenanted and agreed with the holders of the Bonds to fix, establish, and maintain such rates and collect such fees, rentals and other charges for the services and facilities of the System and revise the same from time to time whenever necessary, as will always

provide (i) net revenues in each Fiscal Year sufficient to pay 100% of the Bond Service Requirement becoming due in such Fiscal Year on the outstanding Bonds and on all outstanding Additional Bonds, (ii) Pledged Revenues in each Fiscal Year sufficient to pay 125% of the Bond Service Requirement becoming due in such Fiscal Year on the outstanding bonds, plus (iii) Pledged Revenues in each fiscal year sufficient to pay 100% of all reserve and other payments required to be made pursuant to the Ordinance. Plaintiff has further covenanted to irrevocably pledge the Excise Taxes to the payment of the principal of and interest on the Bonds, and the pledging of the Excise Taxes in the manner provided in the Ordinance shall not be subject to repeal, modification or impairment by any subsequent resolution, ordinance or other proceedings of Plaintiff or by any subsequent act of the Legislature of Florida; provided, however, that the pledge of the Excise Taxes shall be subject to release in the manner and upon the terms and conditions specified in the Ordinance.

19. The Bonds are of the character and the proceedings preliminary to the issuance thereof are of the nature as entitle Plaintiff to proceed within the provisions of Chapter 75, Florida Statutes, for the purpose of having the right of Plaintiff to issue the Bonds determined.

20. Due and proper notice addressed to the State of Florida, and the several property owners, taxpayers and citizens of Plaintiff, including non-residents owning property or subject to taxation therein and all others having or claiming any right, title or interest in property to be affected by the issuance by Plaintiff of the Bonds hereinbefore described was published in a newspaper of general circulation in the City of Niceville, Florida, once each week for three consecutive weeks, the first publication being at least twenty days prior to the date of said hearing, as required by law, all as will more fully appear from the affidavit of the publisher of the *Playground Daily News*, heretofore herein filed.

21. The Answers of the State Attorney for and on behalf of the State of Florida, and other intervenors have been carefully considered by this Court. Such Answers show no cause why the prayer of Plaintiff should not be granted and discloses no irregularity or illegality in the proceedings set forth in said Complaint, and the objections contained in said Answers be and the same are hereby overruled and dismissed.

22. This Court has found that all requirements of the Constitution and laws of the State of Florida pertaining to the enabling act and proceedings in the above entitled matter have been strictly followed.

23. In this Court's Order of March 16, 1987, entered June 25, 1987, the Court determined that the final hearing would encompass three issues required by Florida law.

(a) Whether the City of Niceville has the authority to issue such bonds under the Florida Constitution and statutes;

(b) Whether the purpose of the obligation is legal; and

(c) Whether the City of Niceville's authorization of the obligation complies with the requirements of law.

Upon the record of these proceedings, and the evidence produced at final hearing, this Court concludes that:

(a) The City of Niceville has the authority to issue the revenue bonds which are the subject of this petition under the Florida Constitution and statutes;

(b) The purpose of the obligation is legal; and

(c) The City of Niceville's authorization of their obligation complies with the requirements of law.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED, that the issuance of the Cable Television Revenue Bonds, Series 1985, by the City of Niceville, Florida, in the sum of not exceeding $2,000,000, as more particularly described in the Ordinance, to be dated as of a

date to be fixed by resolution of Plaintiff adopted prior to the delivery of the Bonds, to be in such denominations to bear interest, payable at such times and at such rate or rates not exceeding the maximum rate fixed by the enabling act or by other applicable law, and to mature on such dates and in such years and amounts, all as shall be fixed by resolution of Plaintiff adopted prior to the delivery of the Bonds, is for a proper, legal and corporate public purpose and is fully authorized by law, and that said Bonds and each of them to be issued as foresaid and all proceedings incident thereto are hereby validated. The Bonds are to be issued to finance the cost of the acquisition and construction of the Project. The Bonds as and when so issued, will be payable solely from and secured by a lien upon and pledge of the Pledged Revenues, as defined in the Ordinance.

There shall be stamped or written on the back of each of said Bonds, a statement in substantially the following form:

> This Bond is one of a series of Bonds which were validated by judgment of the Circuit Court for Okaloosa County, Florida, rendered on ————, 1987.
>
> By: ————————————
> Mayor
> City of Niceville, Florida

DONE AND ORDERED at the Courthouse Annex in Shalimar, Okaloosa County, Florida, this 5th day of August, 1987.

By: /s/ Erwin Fleet
Judge of the Circuit Court for
Okaloosa County, Florida

APPENDIX C

IN THE CIRCUIT COURT
IN AND FOR OKALOOSA COUNTY, FLORIDA

Re: Validation of not
Exceeding $2,000,000
Cable Television
Revenue Bonds,
Series 1985

Case No. 86-2427-C

CITY OF NICEVILLE, FLORIDA, a municipal corporation of the State of Florida,

Plaintiff,

v.

STATE OF FLORIDA and the TAXPAYERS, PROPERTY OWNERS AND CITIZENS OF NICEVILLE, FLORIDA, including non-residents owning property or subject to taxation therein, *et al.*

ORDER

THIS CAUSE coming on for hearing upon all pending motions, pre-trial matters and counsel for the Plaintiff having appeared together with counsel for the State of Florida and counsel for Intervenor, Warner Cable Communications, Inc. having been present and the Court being advised in the premises it is

ORDERED AND ADJUDGED:

1. Upon stipulation of Counsel the Intervenor, Warner Cable Communications, Inc., is admitted as a proper party in this cause.

2. Upon stipulation of counsel the evidentiary hearing on the Rule to Show Cause is continued and a new rule to show cause shall not be required.

3. The Court sets this matter for final hearing in Chambers at 9:00 o'clock A.M. on March 20, 1987.

4. That Defendant Intervenor, Warner Cable Communications, Inc.'s, Motion for Summary Judgment is denied.

5. That Defendant Intervenor, Warner Cable Communications, Inc.'s, Motion for Abatement is denied.

6. That ten (10) days prior to the trial date of March 20, 1987, counsel for all parties shall file with the Court a statement containing the following:

(a) Counsel's understanding of the issues of fact;

(b) Counsel's understanding of the issues of law;

(c) List of witnesses to be called by each party with a brief summary of contemplated testimony;

(d) A proposed form of judgment on respective issues of law and fact; and memorandum of law in support thereof.

7. The Court sets this matter for further case management conference at 9:00 o'clock A.M. on Monday, March 16, 1987 in Chambers for further appropriate instructions by the Court.

8. All discovery shall be completed on or before March 1, 1987 without further leave of Court.

9. Plaintiff's oral motion to strike paragraph twelve (12) of the Intervenor's affirmative defenses is hereby granted insofar as any of such defenses containing matters outside of the scope of paragraph eight (8) of the Intervenor's affirmative defenses.

10. The Court affirmatively has ruled against the Intervenor's contentions contained in paragraphs 9, 10 and 11 of the affirmative defenses.

11. The Court specifically finds that the City of Niceville has appropriate legal authority pursuant to the Florida Constitution, Laws of Florida, City Charter and other Florida law to issue revenue bonds in this proceeding subject to a determination by the Court as to whether the project in question is a proper public purpose.

DONE AND ORDERED in Chambers at Shalimar, Okaloosa County, Florida, this 25th day of November, 1986.

/s/ Erwin Fleet
ERWIN FLEET
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Order was furnished to Don J. Caton, Esquire and William D. Wells, Esquire, Post Office Box 12910, Pensacola, Florida 32521, Gillis E. Powell, Esquire, Post Office Box 277, Niceville, Florida 32578, Drew Pinkerton, Esquire, Assistant State Attorney, Okaloosa County Courthouse Annex, Shalimar, Florida 32579, Ralph A. Peterson, Esquire, Beggs & Lane, Post Office Box 12950, Pensacola, Florida 32576 and to James E. Moore, Moore & Moore, P.A., Post Office Box 746, Niceville, Florida 32578 by U.S. Mail this 8th day of Dec., 1986.

NEWMAN C. BRACKIN
Clerk of Court

By: /s/ C. N. Fitzpatrick
Deputy Clerk

APPENDIX D

IN THE CIRCUIT COURT
IN AND FOR OKALOOSA COUNTY, FLORIDA

Re: Validation of not
Exceeding $2,000,000
Cable Television
Revenue Bonds,
Series 1985

Case No. 86-2427-C

CITY OF NICEVILLE, FLORIDA, a municipal corporation of the State of Florida,

Plaintiff,

v.

STATE OF FLORIDA and the TAXPAYERS, PROPERTY OWNERS AND CITIZENS OF NICEVILLE, FLORIDA, including non-residents owning property or subject to taxation therein, *et al.*

Defendants.

ORDER

THIS CAUSE coming on for hearing at a case management conference conducted on March 16, 1987, pursuant to notice, and counsel for plaintiff, counsel for defendant State of Florida and ccunsel for defendant Warner Cable Communications, Inc. having appeared and having been present, and the Court being otherwise advised in the premises, it is

ORDERED AND ADJUDGED:

1. The plaintiff's oral motion for a continuance of the final hearing, with the concurrence of counsel for defend-

ant State of Florida and counsel for defendant Warner Cable Communications, Inc., is hereby granted. The parties shall consult this Court's calendar and shall agree upon an available final hearing date sufficient to permit proper publication of an Amended Rule to Show Cause which will be entered by the Court.

2. Defendant Warner Cable Communications, Inc.'s Motion for Reconsideration and Clarification of paragraphs 9 and 10 of this Court's Order of November 25, 1986, striking paragraphs 10 and 11 of the defendant's affirmative defenses, is hereby denied. Whether or not the Court had authority to consider and decide plaintiff's oral motion to strike on November 25, 1986, the Court now finds that, under Rule 1.200, Florida Rules of Civil Procedure, the Court has authority to limit and simplify issues in an action during case management and pretrial conferences such as the conference held on March 16, 1987. Therefore, the court affirms its ruling of November 25, 1986, striking the affirmative defenses of defendant Warner Cable Communications, Inc. found in paragraphs 10 and 11 of the defendant's answer. Specifically the Court finds that the issues sought to be raised by paragraphs 10 and 11 of the affirmative defenses of defendant Warner Cable Comunications, Inc. are matters which are collateral to a bond validation proceeding and therefore will not be considered and will not be addressed by the Court in this bond validation proceeding. *McCoy Restaurants, Inc. v. City of Orlando*, 392 So.2d 252 (Fla. 1980); *Wohl v. State of Florida*, 480 So.2d 639 (Fla. 1985).

3. Defendant Warner Cable Communications, Inc.'s Motion for Reconsideration and Clarification is granted to the extent of the following findings and rulings, and the Court hereby rules as follows:

a. The Court hereby reconsiders its finding contained in paragraph 11 of its Order of November 25, 1986, es-

pecially in light of the new publication of an Amended Rule to Show Cause. In paragraph 11 of the Order of November 25, 1986, the Court found:

> The Court specifically finds that the City of Niceville has appropriate legal authority pursuant to the Florida Constitution, laws of Florida, City Charter, and other Florida law to issue revenue bonds in this proceeding subject to a determination by the Court as to whether the project in question is a proper public purpose.

Paragraph 11 of the Order of November 25, 1986, is hereby vacated, and the plaintiff shall be required to present evidence and meet its burden of proof of establishing its authority to issue the revenue bonds which are the subject of this action.

b. At final hearing in this bond validation proceeding, the three issues to be considered and determined by the Court are:

(1) Whether the City of Niceville has the authority to issue such bonds under the Florida Constitution and statutes;

(2) Whether the purpose of the obligation is legal; and

(3) Whether the City of Niceville's authorization of the obligation complies with the requirements of law.

Wohl, 480 So.2d 639; *McCoy Restaurants, Inc.*, 392 So.2d 252.

DONE AND ORDERED in Chambers at Shalimar, Okaloosa County, Florida, this 16th day of March, 1987.

/s/ ERWIN FLEET, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Drew S. Pinkerton, Esquire, Assistant State Attorney, Okaloosa County Courthouse Annex, Shalimar, FL 32579; Gillis E. Powell, Sr., Esquire, Powell, Powell & Powell, Post Office Box 277, Niceville, FL 32578; and William D. Wells, Esquire, and Don J. Caton, Esquire, Office of the City Attorney, City Hall, Pensacola, Florida; Ralph A. Peterson, Esquire, Beggs & Lane, Post Office Box 12950, Pensacola FL 32576; and James E. Moore, Esquire, Moore & Moore, Post Office Box 746, Niceville, FL 32578 by U.S. Mail this 25th day of June, 1987.

NEWMAN C. BRACKIN
Clerk of Circuit Court

By /s/ Cathy N. Fitzpatrick
Deputy Clerk

APPENDIX E

MANDATE
SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the Circuit Court in and for Okaloosa County, Florida

WHEREAS, in that certain cause filed in this Court styled:

WARNER CABLE COMMUNICATIONS, INC., et al. v. CITY OF NICEVILLE, FLORIDA

Case No. 71,134

Your Case No. 86-2427-C

The attached opinion was rendered on January 14, 1988

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Parker Lee McDonald

Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 16th day of March 1988.

/s/ Sid J. White
Clerk of the
Supreme Court of Florida

APPENDIX F

SUPREME COURT OF FLORIDA

Wednesday, March 16, 1988

Case No. 71,134

Circuit Court No. 86-2427-C
(Okaloosa)

WARNER CABLE COMMUNICATIONS, INC., *et al.*,
Appellants,

v.

CITY OF NICEVILLE, FLORIDA,
Appellee.

Upon consideration of the Motion for Rehearing and for Clarification filed in the above cause by attorneys for appellants, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

[SEAL]

TC

cc: Hon. Newman C. Brackin, Clerk
Hon. Erwin Fleet, Judge

James E. Moore, Esquire
Ralph A. Peterson, Esquire
Don J. Caton, Esquire
William D. Wells, Esquire
Gillis E. Powell, Sr., Esquire
Drew S. Pinkerton, Esquire

APPENDIX G

IN THE SUPREME COURT OF FLORIDA

Case No. 71,134

WARNER CABLE COMMUNICATIONS, INC., *et al.*,
Appellants,

v.

CITY OF NICEVILLE, FLORIDA,
Appellee

APPELLANT'S MOTION FOR REHEARING AND FOR CLARIFICATION

Appellant, Warner Cable Comunications, Inc., (hereinafter "Warner"), pursuant to Rule 9.330, Florida Rules of Appellate Procedure respectfully moves this Honorable Court to rehear, reconsider and clarify its decision entered in this case on January 14, 1988. As grounds for this motion, Warner states that the decision overlooks and does not address the issue of denial of appellant's rights of fundamental due process. Therefore, the decision misapprehends the effect of its full affirmance of the trial court's judgment on the appellant's ability to obtain due process on appellant's affirmative defenses that this Court has now determined to be collateral issues which are to "be addressed in other courts in other cases." *Warner Cable Communications, Inc., v. City of Niceville*, No. 71,134, (Fla. Jan. 14, 1988) at 2.

As more particular grounds in support of this motion, Warner states:

1. This Court concluded in its decision that Warner's affirmative defenses which the trial court struck, were "collateral issues and, therefore, not cognizable in this bond validation." *Id.* The Court additionally stated that these collateral issues "may be addressed by other courts in other cases." *Id.* Nevertheless, this Court overlooked in its decision that while the trial court originally struck these affirmative defenses and initially declared that it would nether consider nor address these issues in the bond validation proceedings (A. 154, 425, 437-438), the trial court subsequently, in its final judgment validating the bonds, made rulings on the merits of those affirmative defenses which had been previously struck. (A. 220-223). The trial court made these findings of fact and conclusions of law on the merits, even though it had struck the defenses, had refused to hear any evidence on these issues, and had expressly precluded Warner from offering any evidence and from being heard on these issues. (A. 154, 425, 437-438, 46, 48, 53, 58-62, 100, 118-120, 125-128, 140, 149, 162-163, 168, 169-171.)

2. (This Court has now ruled that Warner's affirmative defenses which were struck by the trial court are collateral issues to a bond validation. Thus, the specific defenses which this Court has now declared are issues collateral to a bond validation are as follows:

a. Whether the municipality has failed to comply with the legal requirements of its own charter in enacting the bond ordinance and for authorizing issuance of revenue bonds.

b. Whether the Florida municipality has complied with or can ever comply with both the requirements of the Cable Communications Policy Act of 1984, Title 47, United States Code, ("the Cable Act") and the Florida Constitution's prohibition against delegation of legislative authority when the municipality attempts to obtain any ownership interest in a cable television system.

c. Whether a muncipality's bond ordinance authorizing municipal construction and operation of a cable television is pre-empted by federal law under the Cable Act.

d. Whether the revenue bonds for the municipally owned cable television system actually contemplate a pledge of credit of the state or political subdivision, or stated alternatively, whether the bond issue is being secured by a promise of financing and security whose practical effect is to pledge the ad valorem taxing power of the municipality and to obligate ad valorem tax revenues, thus requiring voter approval by referendum.

e. Whether the municipality's determination and finding of public purpose for the issuance of bonds is unfounded, arbitiary, capricious, clearly erroneous, or an abuse of discretion.

f. Whether the municipality has acted and exercised its power in bad faith or has violated its legal duty, or has acted arbitrarily, capriciously, or contrary to law in issuing the bonds and pursuing the construction and operation of a municipally owned cable television system when the municipality declares there is a need and public necessity for the system, but no such actual need nor public necessity exists; when the system unnecessarily duplicates cable television services already being provided; when the municipality has yet to determne whether its proposed cable television system is economically and fiscally feasible; and/or when the municipality is aware that its cable television system is not economically and fiscally feasible, but withholds that information from its citizens and still continues to go forward with the system's construction and operation to the deteriment of citizens, taxpayers, and presently existing cable operators. (A. 212-213).

The Court did not specifically identify all of these collateral issues in its decision but did mention and generally categorized some of them:

> Warner, which currently provides cable service in Niceville, raised several affirmative defenses, including, among other things, the economic and fiscal feasibility of a municipally owned cable project, the necessity for such a project, and the applicability of federal cable law.

Warner, No. 71,134 at 1.

3. These affirmative defenses which this Court has now declared to be collateral issues to be addressed in "other courts in other cases" were erroneously and unconstitutionally decided on the merits by the trial court in its final judgment in the bond validation hearings:

a. In paragraphs 4 and 6 of the trial court's judgment, the trial court expressly found on the merits that the City had complied with all applicable provisions of the City's charters. (A. 220-221).

b. and c. In paragraph 7 of the judgment, the trial court expressly decided on the merits issues pertaining to the Cable Act and found that the Cable Act did not preclude the City from issuing the cable television revenue bonds.

d. In paragraph 8 of the judgment, the trial court ruled on the merits against Warner on the issue of whether the bond issue for a municipally owned cable system constituted a pledge of public credit and the ad valorem taxing power of the City. (A. 221).

e. In paragraphs 5 and 8 of the final judgment, the trial court ruled on the merits that the City's finding of public purpose was neither arbitrary, capricious, unfounded, clearly erroneous nor contrary to law and was not beyond the power of the City. (A. 220, 221).

f. In paragraph 3 of the judgment, the trial court expressly ruled on the merits that the cable television project was necessary and essential. (A. 220). In paragraphs 9, 10 and 11 of the final judgment, the trial court

specifically ruled on the merits that the City had not acted in bad faith nor committed fraud or a violation of any legal duty. The trial court also ruled on the merits of the claims of abuse of discretion and bad faith as related to duplicative services, economic and fiscal feasibility, and wrongful withholding of information from the citizens and misleading the citizens about information related to the cable television system, its feasibility and its actual costs to citizens. (A. 221-222).

4. The trial court's striking of these affirmative defenses and precluding presentation of any evidence or hearing on these issues, followed by the trial court's making findings of fact and conclusions of law on the merits of these issues in its final judgment constitutes a denial of Warner's fundamental right of due process of law. *Cortina v. Cortina*, 98 So.2d 334 (Fla. 1957); *Stack v. Okaloosa County*, 347 So.2d 145, 146 (Fla. 1st DCA 1977); *Brady v. Jones* 491 So.2d 1272, 1273 (Fla. 2d DCA 1986). If this Court's affirmance of that final judgment is left uncorrected, Warner will again be denied due process and prevented from being properly heard on those collateral issues. *Id.*

5. Furthermore, because the present decision of this Court also affirms, without comment, the trial court's judgment on the merits of the affirmative defenses and collateral issues, Warner may very well be precluded from ever being heard on these collateral issues in the "other courts in other cases" because of the preclusive effects of the doctrines of res judicata and collateral estoppel. While it is clear from the decision that this Court is allowing collateral issues to be raised and addressed in proceedings other than bond validation proceedings, the Court's silence on the fundamental due process question and its blanket affirmance of the trial court's judgment will result in barring Warner from being heard on the collateral issues. Indeed, the City of Niceville, even before this Court's decision becomes final,

has filed with the federal court its assertion that those collateral issues which are included in all of the trial court's findings and which are also before the federal court have been decided by this Court and the state trial court, and, therefore, the Florida courts' decisions are res judicata. A copy of the City's filing with the federal court (without its attachments of the decisions of this Court and the trial court) is attached hereto as Exhibit A.

WHEREFORE, Warner Cable Communications, Inc., respectfully requests the Court:

a. To rehear and clarify its decision of January 14, 1988.

b. To amend its decision to specifically delineate the struck affirmative defenses specified above which the Court has declared to be collateral issues so other courts and counsel will be able to identify the collateral issues in other cases.

c. To amend its decision to declare that the trial court denied Warner its fundamental due process rights when the trial court ruled on the merits against Warner on those above-specified affirmative defenses which were struck and not heard.

d. To reverse the trial court's rulings on the merits of the affirmative defenses (collateral issues) as a denial of fundamental due process and to remand this action to the trial court with directions to amend its final judgment by deleting all rulings on the merits of the collateral issues contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the final judgment.

Respectfully submitted,

/s/ Ralph A. Peterson
RALPH A. PETERSON
BEGGS & LANE
P.O. Box 12950
Pensacola, FL 325-76-2950
(904) 432-2451

and

JAMES E. MOORE,
MOORE & MOORE, P.A.
102 Bayshore Dr.
Niceville, FL 32578
(904) 678-1121

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Drew S. Pinkerton, Esquire, Assistant State Attorney, Okaloosa County Courthouse Annex, Shalimar, FL 32579, Gillis E. Powell, Sr., Esq. of Powell, Powell & Powell, P. O. Box 277, Niceville, FL 32578, and Don J. Caton, Esquire and William D. Wells, Esquire, Office of the City Attorney, Pensacola City Hall, Pensacola, FL by HAND DELIVERY, this 22nd day of January, 1988.

/s/ Ralph A. Peterson
RALPH A. PETERSON
BEGGS & LANE
P.O. Box 12950
Pensacola, FL 32576-2950
(904) 432-2451

Exhibit "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 85-4414-RV

WARNER CABLE COMMUNICATIONS, INC.,
Plaintiff,

v.

CITY OF NICEVILLE, *et al.*,
Defendants.

DEFENDANTS' NOTICE OF FILING

Defendant City of Niceville hereby serves its notice of filing a decision of the Florida Supreme Court entered on January 14, 1988. The decision is not final until time expires to file a motion for rehearing and, if filed, said motion is determined by the Court. This decision affirmed in total the Trial Court's order in the bond validation proceeding, which order was entered on August 5, 1987. A copy of that order entered by the Honorable Erwin Fleet, Circuit Judge, in Case Number 86-2427-C in the Circuit Court in and for Okaloosa County is also filed herewith.

The issue of "public purpose" and the issue of whether the City has the authority to issue the bonds and to acquire and construct the cable television system in question was determined in favor of the City of Niceville in this bond validation proceeding. The bond validation proceeding covered all issues pertaining to whether the City of Niceville has the authority to issue the bonds in

question, the legality of the purpose and questions regarding all procedural and other legal requirements in order to issue said bonds (see Supreme Court opinion and paragraph 23 of the Trial Court's opinion). The findings of the Trial Court on all of these issues which findings were affirmed by the Florida Supreme Court are set forth in detail in the Trial Court's order filed herein.

It is the position of the City of Niceville that after the possibility of a rehearing is disposed of, this Court is bound by all of the matters decided by the Florida Supreme Court under the principles of res judicata. In the defendants' memorandum in support of their motion for summary judgment, the defendants have previously provided this Court with applicable authorities relating to res judicata.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail to Ralph A. Peterson, Esquire of Beggs and Lane, Post Office Box 12950, Pensacola, Florida 32576-2950; James E. Moore, Esquire of Moore and Moore, Post Office Box 746, Niceville, Florida 32578; Rita G. Hawkins, Attorney-at-Law, Post Office Box 515, Niceville, Florida 32578; and Gregory J. Dunn, Esquire, 425 Metro Place North, Suite 500, Dublin, Ohio 43017; attorneys for plaintiff; this 20th day of January 1988.

/s/ Don J. Caton
DON J. CATON
WILLIAM D. WELLS
Post Office Box 12910
Pensacola, Florida 32521-0073
(904) 435-1615

Attorneys for Defendants

APPENDIX H

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case No. 71,134

WARNER CABLE COMMUNICATIONS, INC., *et al.*,
Defendants/Appellants,

vs.

CITY OF NICEVILLE, FLORIDA,
a municipal corporation of the State of Florida,
Plaintiff/Appellee.

On appeal from the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida

---

INITIAL BRIEF OF APPELLANT

JAMES E. MOORE
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Attorneys for Warner Cable Communications, Inc.

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* * * *

II. THE TRIAL COURT ERRED AND DENIED WARNER FUNDAMENTAL DUE PROCESS OF LAW WHEN IT GRANTED THE CITY'S UNTIMELY MOTION TO STRIKE WARNER'S AFFIRMATIVE DEFENSES, WHEN IT PRECLUDED INTRODUCTION OF EVIDENCE PERTAINING TO THE ISSUES RAISED IN THE STRICKEN AFFIRMATIVE DEFENSES, WHEN IT DECLARED THAT IT WOULD NOT CONSIDER NOR ADDRESS THE ISSUES RAISED BY THE AFFIRMATIVE DEFENSES, AND WHEN IT SUBSEQUENTLY ENTERED FINAL JUDGMENT AFTER THE VALIDATION HEARING AGAINST WARNER ON THE ISSUES ORIGINALLY RAISED BY THE STRICKEN AFFIRMATIVE DEFENSES.

On November 25, 1986, the City made an unnoticed, oral motion to strike the affirmative defenses raised by Warner in its answer filed on October 6, 1986. (A. 427, 437). The City's motion was untimely since it was presented more than 20 days after service of Warner's answer. Fla.R.Civ.P. 1.140(f). Because the motion was untimely, the City waived any objection as to whether Warner's affirmative defenses stated a legal defense in the bond validation proceedings. *See id.* Therefore, the trial court erred in hearing, considering, and deciding the City's motion, and the trial court should be directed to reinstate the affirmative defenses and, on remand, take testimony and evidence on the defenses raised.

In its order on Warner's motion for reconsideration and clarification, the trial court avoided ruling on the Rule 1.140(f) waiver issue by deciding *sua sponte* that the affirmative defenses should be stricken. (A. 437-438). Relying on Rule 1.200, Florida Rules of Civil Procedure, the trial court stated that it had the authority to "limit and simplify issues." (A. 437-438). In so striking Warner's affirmative defenses as legally insufficient, the trial

court acted contrary to the law of Florida which prohibits a trial court from striking, on its own initiative, affirmative defenses for the reason that they are legally insufficient, since a motion attacking legal sufficiency can only be presented by a party. *Bay Colony Office Building Joint Venture v. Wachovia Mortgage Company*, 342 So. 2d 1005, 1006 (Fla. 4th DCA 1977). Thus, the trial court erred and its decision to strike the affirmative defenses must be reversed.[5]

While the trial court erred procedurally in even considering and then granting the City's motion to strike the affirmative defenses, the trial court subsequently committed additional and more egregious error which has resulted in denying Warner fundamental due process of law. The trial court made findings of fact and conclusions of law in its final judgment on the merits of Warner's affirmative defenses, even though the trial court had stricken those affirmative defenses and prevented Warner from litigating and presenting evidence on those issues. Such action by the trial court is a denial of Warner's fundamental due process rights. *Cortina v. Cortina*, 98 So.2d 334, 336-37 (Fla. 1957); *Stack v. Okaloosa County*, 347 So.2d 145, 146 (Fla. 1st DCA 1977); *Brady v. Jones*, 491 So.2d 1272, 1273 (Fla. 2d DCA 1986).

After having stricken Warner's affirmative defenses, the trial court specifically declared that it would not consider nor address matters raised in paragraphs 10 and 11 of the affirmative defenses concerning the City's authority under the Cable Act to own and operate a cable system, the City's noncompliance and inability to comply

[5] The court in *Bay Colony* did recognize, nevertheless, that a court can strike defenses if they are immaterial or "so entirely without any possible relation to the controversy as to warrant their being stricken." *Id.* at 1006. As discussed below, the affirmative defenses raised by Warner were not only legal defenses, but were material and very much related to this proceeding.

with Section 613 of the Cable Act (47 U.S.C. § 533), and the pledging of ad valorem taxes. (A. 438). Furthermore, during the bond validation hearing, the trial court refused to permit introduction by Warner of any testimony or evidence relating to whether the City had met the requirements of law for enacting Ordinance No. 583, for authorizing expenditures for the cable system, and for issuance of revenue bonds under the City's charter as raised by the stricken affirmative defense in paragraph 9 of Warner's answer. (A. 46, 53, 58-62).[6] Inexplicably, the trial court permitted the City to present testimony on the ad valorem taxation issue, (A. 69-79), and even made inquiries itself on that issue, (A. 79-80), but it subsequently prohibited Warner from presenting any evidence on that same issue. (A. 118-120). Moreover, at any point during the bond validation hearing where in the trial court's opinion it appeared that Warner was presenting evidence related to whether the City's actions were an abuse of discretion, were arbitrary, or were accomplished in bad faith, (issues raised in paragraph 12 of the affirmative defenses) the trial court disallowed the evidence. (A. 48, 53, 100, 125-128, 140, 149, 162-163, 167-168).

Having excised these defenses from the pleadings, having declared them not at issue in the proceeding, and having prevented Warner from being heard on these defenses, the trial court inexplicably entered final judgment on the merits of these defenses against Warner. In paragraph 5 of the final judgment (A. 220), the trial court declared that the City's finding of public purpose in enacting Ordinance No. 583 was "neither arbitrary, capricious, nor contrary to law," matters which the trial court precluded the parties from litigating by striking paragraph 12 of Warner's affirmative defenses. (A. 425). The trial court ruled in paragraph 6 of the judgment (A. 220-21) that the City had acted properly under Section 1.02(h)

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[6] Indeed, when Warner proffered testimony concerning this issue the trial judge physically left the courtroom. (A. 58).

of Ordinance No. 511, the issue raised by paragraph 9 of Warner's stricken affirmative defenses. (A. 425).

The trial court also decided in paragraph 7 of the judgment that the Cable Act did not preclude the City of Niceville from issuing the revenue bonds. (A. 221). Incredibly, the trial court made this finding after it expressly precluded any opportunity for the parties to be heard on the issue by striking paragraph 10 of the affirmative defenses and instructing the parties that it would neither consider nor address the issue. (A. 437-438). Likewise, after striking paragraph 11 of the affirmative defenses and expressly declaring that the issue of pledging ad valorem taxes would not be litigated (A. 437-438), the trial court declared in paragraph 8 of the judgment that Warner and the State of Florida had failed to make any showing that the bonds would result in a pledge of the public credit. (A. 221). The trial court, in essence, has faulted the defendants for failing to introduce evidence after they were directed by that same court not to litigate and prove their positions on the issue. The trial court allowed the City to introduce evidence on this issue, but not the other parties. (A. 69-80, 118-120).

The trial court also made specific findings and ruled on those matters raised by paragraph 12 of Warner's affirmative defenses which were previously stricken as not going to the issue of whether the City's cable system served a public purpose. In paragraph 3 of the final judgment, the trial court ruled that the City's cable system was necessary and essential, although the City presented no evidence to support such a finding. (A. 219). The trial court then inconsistently stated in paragraph 9 of the judgment that the "need and necessity of the project" was beyond the scope of its review. Again, after precluding the parties from litigating the issues of bad faith, abuse of discretion, and arbitrary and capricious conduct, the trial court in paragraph 9 and 10 of the judgment inexplicably ruled on the merits against

Warner on these issues because no evidence was presented. (A. 221).

Finally, the trial court found in paragraph 16 of the judgment that the revenues pledged would be "sufficient to pay all of the principal and interest on the Bonds and to make all other payments provided for in the Ordinance [No. 583]." (A. 223). The trial court permitted the City to present evidence in support of this finding through the testimony of Bill Fray, the City's financial advisor. (A. 72-74). On cross-examination, Fray conceded, however, that the basis for his opinion was the opinion of the City's cable television consultant, Thomas K. Miller, that the City's cable system was economically feasible. (A. 80-81, 82, 91). Fray explained that if the project was not economically feasible, then his opinion would likely differ as to whether the pledged revenues would be sufficient to service the bonds. (A. 89).

The City pleaded in its complaint the sufficiency of the pledged revenues to service the bonds (A. 181) and opened the door at hearing through Fray's testimony to have the issue litigated. (A. 72-74). Indeed, the trial court clearly determined that the matter was material when it permitted the City to introduce evidence on the issue and then when it made a specific finding on the question in its final judgment. The presentation of evidence on and review by the court of the sufficiency of the expected revenues and economic feasibility is authorized by Florida law. *State v. City of Jacksonville*, 50 So.2d at 534, 538 (The Court examined testimony and evidence received on the feasibility of the project to determine whether the trial court's finding of sufficiency of revenues to meet the financial obligation was correct); *Gate City Garage v. City of Jacksonville*, 66 So.2d 653, 663 (Fla. 1953) (The trial court heard and considered evidence on the feasibility of the plan for which bonds were to be issued and on the sufficiency of revenues; the Supreme Court affirmed the trial court's finding after

reviewing the evidence). Nonetheless, when Warner attempted to present evidence on the issue of sufficiency of pledged revenues, the trial court did not permit Warner to introduce any evidence to rebut the City's contention that the pledged revenues were sufficient. (A. 153-155). Warner was precluded from presenting facts which would have demonstrated that the City's project was not economically feasible and thus provide a factual predicate for a hypothetical question to Fray as to the sufficiency of the pledged revenues. (A. 153-155). The trial court again inexplicably disallowed Warner to be heard on this issue, but then ruled on the merits of the issue in the final judgment.

In view of the foregoing, it is abundantly clear that the trial court's findings of fact and conclusions of law in paragraphs 3, 5 through 9, and 16 must be voided and reversed since Warner has been denied its fundamental due process rights. *Cortina*, 98 So.2d at 336-37; *Stack*, 347 So.2d at 146; *Brady*, 491 So.2d at 1273. Furthermore, remand to the trial court is appropriate for the taking of further testimony and evidence on the issues raised by Warner's affirmative defenses since they are both legal defenses and materially related to the controversy. *See, Bay Colony*, 342 So.2d at 1006.

III. THE TRIAL COURT ERRED IN STRIKING WARNER'S AFFIRMATIVE DEFENSES SINCE THE DEFENSES RAISED WERE LEGAL UNDER STATE AND FEDERAL LAW

By its inclusion of rulings on the merits of issues raised by Warner's affirmative defenses in its judgment, the trial court has now accepted that these issues are material and were legal defenses, although it previously precluded Warner from litigating those issues. The law of Florida is clear that the defenses raised were legally sufficient, because they were properly raised in the pleadings, the defenses were properly within the scope of

review in the bond validation proceedings, and Warner should have been allowed to be heard on them.

It is beyond cavil that the City was required to prove that the authorization of the revenue bonds obligation complies with the requirements of law, including a showing that the adoption of the bond ordinance (Ordinance No. 583) was procedurally correct and that the City "has taken all the required steps for the issuance of the bonds in compliance with the applicable provisions of law." *Wohl v. State*, 480 So.2d 639, 641, 642, (Fla. 1985); § 75.03, Fla. Stat. Noncompliance with the requirements of law in adopting a bond ordinance and for issuance of bonds prevents the bonds from being validated. *See id.; Taylor v. Lee County*, 498 So.2d 424, 425 (Fla. 1986). Paragraphs 9, 10, and 11 of Warner's affirmative defenses properly raised defenses to the questions of whether the bond ordinance had been adopted in accordance with applicable provisions of the law and whether there was compliance by the City with the requirements of law for issuance of the bonds.

* * * *

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Drew S. Pinkerton, Esquire, Assistant State Attorney, Okaloosa County Courthouse Annex, Shalimar, FL 32579, Gillis E. Powell, Sr., Esq., of Powell, Powell & Powell, P. O. Box 277, Niceville, FL 32578, and Don J. Caton, Esquire and William D. Wells, Esquire, Office of the City Attorney, Pensacola City Hall, Pensacola, FL, by HAND DELIVERY this 23rd day of September, 1987.

/s/ James E. Moore
JAMES E. MOORE
MOORE & MOORE, P.A.
P.O. Box 746
102 Bayshore Drive
Niceville, Florida 32578
(904) 678-1121

APPENDIX I

IN THE CIRCUIT COURT
IN AND FOR OKALOOSA COUNTY, FLORIDA

Case No. 86-2427-C

Re: Validation of not
Exceeding $2,000,000
Cable Television
Revenue Bonds,
Series 1985

CITY OF NICEVILLE, FLORIDA,
a municipal corporation of the State of Florida,
Plaintiff,

v.

STATE OF FLORIDA and the TAXPAYERS, PROPERTY OWNERS and CITIZENS of NICEVILLE, FLORIDA, including non-resident owning property or subject to taxation therein, *et al.*,

Defendants.

ANSWER

Defendant, WARNER CABLE COMMUNICATIONS, Inc., (hereinafter referred to as "Warner"), a taxpayer of the City of Niceville, and an affected party as defined by Section 75.05, Florida Statutes, by and through the undersigned counsel, in answer to the complaint states the following:

1. Admitted.

2. Admitted, but Warner is without knowledge as to whether Ordinance No. 511 was approved by referendum

vote, and Warner denies that Ordinance No. 511 properly and legally amends Plaintiff's legislative charter.

3. Denied.

4. Admitted that Plaintiff enacted Ordinance No. 583 but denied that Ordinance No. 583, its enactment, its purposes, and any implementation thereof are valid, proper, lawful, or constitutional.

5. Ordinance No. 583, attached as an exhibit to the Complaint, speaks for itself, and any allegations in paragraph 5 excluded from, inconsistent with, or contrary to the terms and provisions of Ordinance No. 583 are denied.

6. Ordinance No. 583, attached as an exhibit to the Complaint, speaks for itself, and any allegations in paragraph 6 excluded from, inconsistent with, or contrary to the terms and provisions of Ordinance No. 583 are denied. It is denied that the bonds will not constitute a general indebtedness of Plaintiff and that no ad valorem taxes shall be required to be levied for payment of the principal of or interest on such bonds.

7. Denied.

AFFIRMATIVE DEFENSES

8. The issuance of revenue obligations to finance the cost of the acquisition and construction of a cable television system to be owned and operated by Plaintiff is not a "public purpose" project. No substantial public purpose is served by constructing and operating a municipally owned cable television system, and ny public benefit derived therefrom is merely incidental and indirect.

9. The validation of the bond issue and any issuance of revenue obligations is unlawful, unauthorized, and not in compliance with the general powers of the City of Niceville since the issuance of revenue bonds, the costs of debt service, and the costs of design, engineering, plan-

ning, acquisition, construction, and operation of a cable television system by the Plaintiff constitute expenditures which exceed $100,000 and which have not been lawfully included and are not contained in Plaintiff's budget, have not been approved by referendum vote, and do not constitute an emergency.

10. Plaintiff's enactment of Ordinance No. 583 and any implementation thereof is improper, unlawful, arbitrary, and unauthorized since the Plaintiff has by its reports, plans, and specifications (as alleged in the Complaint and as adopted by the Plaintiff) determined the content of cable service, and exercised editorial control over that content, in violation of Section 613 of Title 47, United States Code (The Cable Communications Policy Act of 1984), and therefore is not authorized to have an ownership interest in a cable television system; alternatively, the Plaintiff has failed to comply with Section 613 of Title 47, United States Code, and is therefore unauthorized under law to own and operate a cable television system; or alternatively, the Plaintiff has appointed and established an entity separate from the Plaintiff for the purpose of exercising editorial control over the content of cable service on the Plaintiff's cable system and has delegated its authority unlawfully, unconstitutionally, and arbitrarily.

11. Ordinance No. 583 and the issuance of the revenue obligations have not been submitted to referendum vote and approval of the Plaintiff's electorate, and therefore the bond issue must be found invalid and unauthorized since the practical effect of the bond issue, financing, and security is to pledge the ad valorem taxing power of the Plaintiff and ad valorem taxes revenues and would force an increase in ad valorem taxes.

12. Plaintiff's enacting and implementing Ordinance No. 583 is an abuse of discretion, is arbitrary, and was done in bad faith since there exists no need nor public necessity for a municipally owned cable television system;

a municipally owned cable television system in Niceville constitutes an impermissible duplication of services; the Plaintiff has yet to determine that its cable television system is economically and financially feasible, or alternatively, the Plaintiff is aware that its cable television system is not economically and financially feasible, but is going forward with implementing Ordinance No. 583 and planning, designing, acquiring, and constructing the system; the Plaintiff's cable television system is not economically and financially feasible, cannot be funded under the financial scheme of Ordinance No. 583, and will result in increased costs and taxes to the Plaintiff's citizens and taxpayers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to Gillis E. Powell, Sr., Esquire, Powell, Powell and Powell, Post Office Box 277, Niceville, FL 32578 and Drew S. Pinkerton, Esquire, Assistant State Attorney, Okaloosa County Courthouse Annex, Shalimar FL 32579 by U.S. Mail this 6th day of October, 1986.

/s/ James E. Moore
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Attorneys for Warner Cable
Communications, Inc.

APPENDIX J

SUPREME COURT OF FLORIDA

Tuesday, April 5, 1988

Case No. 71,134

WARNER CABLE COMMUNICATIONS INC., *et al.*
Appellants,

vs.

CITY OF NICEVILLE, FLORIDA
Appellee.

Appellant's Motion To Stay Mandate and Judgment of The Supreme Court of Florida is denied.

A True Copy
TEST:

[SEAL]

BDM

C: Ralph A. Peterson, Esquire
Drew S. Pinkerton, Esquire
Gillis E. Powell, Sr., Esq.
Don J. Caton, Esquire
William D. Wells, Esquire

APPENDIX K

IN THE CIRCUIT COURT
IN AND FOR OKALOOSA COUNTY, FLORIDA

Case No. 87-1447-CAC

C. L. BYRD, Y. P. BYRD,
C. J. PINKSTON, R. K. PINKSTON,
and WARNER CABLE COMMUNICATIONS,
INC., a Delaware corporation,
Plaintiffs,

v.

CITY OF NICEVILLE, a municipal
corporation; and COSMIC
COMMUNICATIONS, INC., a Florida
corporation,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Upon consideration of the motion of defendants to dismiss the first amendment complaint in this action and the Court having considered the memoranda filed by counsel and heard argument thereon, it is,

ORDERED:

1. With respect to all claims arising under the Florida Declaratory Judgment Act, F.S. § 86.011, et seq., (1987), the individual Byrd and Pinkston plaintiffs lack standing to sue. The claims asserted fail to present a present, ascertained, or ascertainable state of facts, and the economic harm alleged is too speculative to be cognizable

under the Florida Declaratory Judgment Act. *Williams v. Howard*, 329 So.2d 277 (Fla. 1976); *Bryant v. Gray*, 70 So.2d 581 (Fla. 1954); *Hunt v. Smith*, 137 So.2d 232 (2nd DCA 1962); *Okaloosa Island Leaseholders Association, Inc. v. Okaloosa Island Authority*, 308 So.2d 120 (1st DCA 1975).

2. Count I of the first amended complaint has previously been decided by this Court in its final judgment of August 5, 1987, in the case of *City of Niceville, Florida, v. State of Florida*, Case No. 86-2427-C. Accordingly, Count I of the first amended complaint is hereby dismissed.

3. Count II has been voluntarily dismissed by notice filed by the plaintiffs on May 2, 1988.

4. Count III of the first amended complaint fails to present a justiciable issue under the Florida Declaratory Judgment Act in that an action does not lie under that statute to obtain a construction of a contract agreement which is clear and unambiguous on its face. *Barrett v. Pickard*, 85 So.2d 630 (Fla. 1956); *Burns v. Hartford Accident and Indemnity Company*, 157 So.2d 84 (3rd DCA 1963); *New Amsterdam Casualty Company v. Intercity Supply Corp.*, 212 So.2d 110 (4th DCA 1968); *Lambert v. Justus*, 313 So.2d 140 (2nd DCA 1975); 19 Fla.Jur.2d, *Declaratory Judgments*, § 11. Accordingly, Count III of the first amended complaint is hereby dismissed.

5. Count IV of the first amended complaint has previously been decided by this Court's final judgment of August 5, 1987, in *City of Niceville, Florida, v. State of Florida*, Case No. 86-2427-C. Accordingly, Count IV of the first amended complaint is hereby dismissed.

6. Count V of the first amended complaint has been previously decided by this Court in its final judgment of

August 5, 1987, in *City of Niceville, Florida, v. State of Florida*, Case No. 86-2427-C. Accordingly, Count V of the first amended complaint is hereby dismissed.

7. Count VI of the first amended complaint has been previously decided by this Court in its final judgment of August 5, 1987, in *City of Niceville, Florida, v. State of Florida*, Case No. 86-2427-C. Accordingly, Count VI of the first amended complaint is hereby dismissed.

8. Count VII of the first amended complaint fails to state a cause of action. It is clear from the allegations of the first amended complaint that the Cosmic contract was for specially skilled services to be rendered by that firm and therefore is not covered by the City of Niceville's competitive bidding procedures and requirements. *Parker v. Panama City*, 151 So.2d 469 (1st DCA, 1963). Accordingly, Count VII of the first amended complaint is hereby dismissed.

9. Count VIII of the first amended complaint fails to state a cause of action. It appears from allegations of the first amended complaint that the Magnavox contract referred to was a contract for specially skilled services and therefore is not covered by competitive biding procedures. *Parker v. Panama City, supra.* Acording, Count VIII of the first amended complaint is hereby dismissed.

10. Count IX of the first amended complaint has previously been decided by this Court in its final judgment of August 5, 1987, in *City of Niceville, Florida, v. State of Florida*, Case No. 86-2427-C. Accordingly, Count IX of the first amended complaint is hereby dismissed.

11. Count X of the first amended complaint has been voluntarily dismissed by the plaintiffs by notice filed on May 2, 1988.

12. Count XI of the first amended complaint has been voluntarily dismissed by notice filed by the plaintiffs on May 2, 1988.[1]

13. Count XII of the first amended complaint has been voluntarily dismissed by notice filed by the plaintiffs on May 2, 1988.

14. Count XIII of the first amended complaint fails to state a cause of action. It is clear from the face of the complaint and has been found by the United States District Court for the Northern District of Florida in its order of April 11, 1988, that there has been no interference or breach of the contractual relationship between Warner Cable Communications, Inc. and the City of Niceville. The complaint fails to allege that the requisite element of the tort of interference with a contract. *Dade Enterprises v. Wometco Theaters*, 160 So.2d 209 (Fla. 1935); *Harvey Corp. v. Universal Equipment Co.*, 29 So.2d 700 (Fla. 1947); *Steffan v. Zernes*, 124 So.2d 495 (1st DCA 1960); 32 Fla.Jur.2d, *Interference*, 52. In addition, the claim of future economic harm is too speculative to be justiciable at the present time. Accordingly, Count XIII of the first amended complaint is hereby dismissed.

15. Count XIV of the first amended complaint has been voluntarily dismissed by the plaintiffs through notice filed May 2, 1988.

16. Count XV of the first amended complaint has previously been determined by this Court in its final judgment of August 5, 1987, in *City of Niceville, Florida, v. State of Florida*, Case No. 86-2427-C. In addition, a

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[1] F.S. § 166.046(6) provides that cable service franchises in existence as of October 1, 1987, shall remain in full force and effect according to their terms. Through Ordinance No. 583, the City of Niceville authorized its municipally owned cable system in 1985. Accordingly, the provisions of F.S. § 166.046 would not apply to the Niceville cable system in any event.

reading of Ordinance No. 583 does not reveal any areas where the plaintiffs have been regulated thereby. Therefore, preemption of federal regulations cannot exist as a matter of law. Accordingly, Count XV of the first amended complaint is hereby dismissed.

17. Count XVI of the first amended complaint alleges that a conspiracy between the defendants in violation of common law principles of unfair competition has occurred and plaintiffs request a declaratory judgment that the City of Niceville's Ordinance No. 583 is invalid. Plaintiffs have failed to allege any violation of the Florida Antitrust Act of 1980, F. S. § 542.16, et seq., (1987), and this Court has previously determined that Niceville's Ordinance No. 583 is authorized, lawful, and valid. Final Judgment, August 5, 1987, *City of Niceville, Florida, v. State of Florida*, Case No. 86-2427-C. Accordingly, Count XVI of the first amended complaint is hereby dismissed.

18. Count XVII of the first amended complaint fails to state a cause of action. Under this claim, plaintiffs allege that the City of Niceville may in the future be able to obtain confidential information under the franchise agreement. However, it is clear from the face of the complaint that plaintiff Warner Cable Communications, Inc. has consented to provide this information to the City of Niceville under the negotiated franchise agreement and such information, once obtained by the City of Niceville, cannot be deemed to be confidential under Florida law. *Browning v. Walton*, 351 So.2d 380 (4th DCA 1977); *Gadd v. News-Press Publishing Co.*, 412 So.2d 894 (2nd DCA 1982). In addition, the claim of future harm is too speculative to present a justiciable issue. Finally, it appears from the order of April 11, 1988, from the United States District Court for the Northern District of Florida in *Warner Cable Communications, Inc. v. City of Niceville*, PCA 85-4414-RV, that the due process issue alleged in Count XVII of the first amended complaint is to be litigated in the pending fed-

eral action. Accordingly, Count XVII of the first amended complaint if hereby dismissed.

19. Plaintiffs' motion to amend Count X, filed May 2, 1988, is hereby DENIED. In Count X of the first amended complaint, plaintiffs attempted to allege a claim of inverse condemnation. No purpose would be served by permitting the plaintiffs to amend Count X because in order to state a claim of inverse condemnation, a complete taking of a property interest without the payment of just compensation is required. *Pinellas County v. Brown*, 450 So.2d 240 (2nd DCA 1984); *Department of Transportation v. Donahoo*, 412 So.2d 400 (1st DCA 1982). In its order of April 1, 1988, the District Court found that Warner Cable Communications, Inc. had lost none of its rights under the franchise through the City of Niceville's enactment of Ordinance No. 583. Therefore, no property rights have been taken by the City of Niceville. Accordingly, plaintiffs' motion to amend Count X of the first amended complaint is hereby denied.

ORDERED in Okaloosa County, Florida, this 3rd day of June, 1988.

/s/ Erwin Fleet
ERWIN FLEET
Circuit Judge

Conformed copies furnished to:

Gillis E. Powell, Sr., Esquire
Don J. Caton, Esquire
James E. Moore, Esquire
Rita Hawkins, Attorney-at-Law
Ralph A. Peterson, Esquire

on this 3rd day of June, 1988.

NEWMAN C. BRACKIN
Clerk of Circuit Court

By /s/ Cathy N. Fitzpatrick
Deputy Clerk